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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

**No. 1114**

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KATHERINE ANN ARKEY, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

---

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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February 12, 1968

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-vs-

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner, KATHERINE ANN ARKEY, respectfully petitions that a Writ of Certiorari issue to review a judgment of the Supreme Court of Ohio, affirming a judgment of the Court of Appeals of Cuyahoga County, sustaining the Cuyahoga County Common Pleas Court, over-ruling petitioner's Motion to Withdraw her plea of guilty to first degree manslaughter and to enter a plea of not guilty.

## OPINIONS

There were no reported or other formal opinions in the courts below.

## JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. § 1254(1) and on this Court's Rule 22(1).

The Supreme Court of Ohio rendered its judgment November 15, 1967. This Petition for Certiorari was filed within ninety days (90) of that date. Petitioner simultaneously filed her Motion to Dispense Printing and for Leave to Proceed with typewritten copies.

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## QUESTIONS PRESENTED

1. Whether a plea of guilty to the commission of a felony, entered by a defendant while under the coercive persuasion of a serious domestic dilemma is such a free and unqualified admission of guilt as to constitute a waiver of constitutional rights to a trial.

2. Whether a defendant who has entered a plea of guilty to the commission of a felony while under such coercion, has the right, eleven days before sentence, to withdraw her guilty plea and to enter a plea of not guilty.

3. Whether a defendant, represented by counsel and properly admonished by the Court enters a plea of guilty, not as an admission of guilt but as the choice of the horn of her dilemma upon which she chooses to be impaled, the representation by counsel and admonition of the Court alleviates the coercion that impelled the plea and whether such plea was indeed a waiver of her constitutional rights to a trial.

## CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution that apply, are as follows:

1. Article 3, Section 2

> "... trial of all crimes, except in cases of impeachment, shall be by jury; such trials shall be held in the State where the said crimes shall have been committed..."

2. Fifth Amendment, Due Process Clause

> "...be deprived of life, liberty or property, without due process of law; ..."

3. Sixth Admendment, Trial by Jury Clause

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, ..."

## STATEMENT OF THE CASE

The Petitioner was indicted March 24, 1966, for first degree manslaughter under Ohio Revised Code Section 2901.06. On July 18, 1966, she withdrew her plea of

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not guilty and entered a plea of guilty.

At that time, she was represented by counsel and was carefully admonished by the court that a plea of guilty may waive constitutional rights, and that she "should not waive those rights unless it is in (her) own best interests to do so". On November 17, 1966, she moved to withdraw the plea of guilty and to enter a plea of not guilty. Eleven days later, on November 28, 1966, the trial Court over-ruled Petitioner's motion and sentenced her to the Ohio Reformatory for Women. Petitioner thereafter filed her appeal with the Court of Appeals of Cuyahoga County and thereafter with the Supreme Court of the State of Ohio, being unsuccessful in each of them.

Facts Material To The Consideration of The Questions Presented

The defendant is married and has three small children who were three, five and six years of age at the time the defendant was before the Trial Court. Her husband suffers mental illness. He was committed for three months to Cleveland State Hospital, being released in the Spring of 1965, and has been on continuous medication thereafter. The husband has a precarious hold on himself; he depends totally upon petitioner for all family decisions. He holds his job only because it requires practically no contact with people, except for an occasional telephone call.

Counsel for Petitioner explained to her, and she understood that in the event of trial, she would have to rely chiefly upon the testimony of her mentally ill husband.

At the time she entered her plea of guilty, Petitioner was convinced that putting her husband in the witness chair would snap the thin strand by which he retains his sanity, forcing his return to Cleveland State Hospital. Her plea of guilty was not an admission of guilt, but was made to preserve the sanity of her husband and for the overall best interests of her family.

It was her plan that, in the event of a prison sentence, the children be placed in the Parmadale Children's Village of St. Vincent de Paul, there being no one in her family or her husband's family to look after the little children of the parties.

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Subsequently she learned that Parmadale did not take children under six years of age and that her children would have to be separated.

Thereafter, upon reflection, she decided that her decision to plead guilty was unwise and, eleven days before imposition of sentence, she filed her Motion to Withdraw the said plea and to enter instead her plea of not guilty.

The federal questions raised in this Petition were raised in the Trial Court by exception and in the Cuyahoga County Court of Appeals and in the Supreme Court of the State of Ohio by assignment of error.

The Journal Entry made by the Common Pleas Court is as follows:

> "Motion to withdraw plea of guilty is overruled. Defendant is sentenced to the Ohio State Reformatory for Women and pay costs."
>
> "Defendant is continued on same bond pending appeal."
>
> H. R. Whiting, Judge
>
> November 28, 1966 ....."

The Journal Entry made in the Cuyahoga County Court of Appeals was as follows:

> "This cause came on to be heard on the appeal on Questions of Law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appelant and therefore the judgment of the Court of Common Pleas is affirmed. It is ordered that appellee recover of the appelant its costs herein expended.
>
> It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts".

The Journal Entry made in the Supreme Court of the State of Ohio was as follows:

> "This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no Motion to Dismiss such appeal having been filed, the Court sua sponte dismissed the appeal for the reason that no substantial constitutional question exists....."

## REASONS FOR GRANTING THE WRIT

There is very little so repugnant to the principle of due process as coercion. Were the guilty plea entered by Petitioner made while under the coercion of a gun at her head, could such plea be considered a voluntary admission of guilt and could it be a waiver of

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constitutional rights?

The gun at the head of the Petitioner, when she entered her guilty plea, was the knowledge that were she to go to trial, her husband's sanity would snap, she would be left without support and the children without a father. On the other hand, were she to plead guilty as she did, the family could lose the mother but the husband's sanity would not be impaired. Thereafter, she learned that were she to be committed to prison, the family would face the further misfortune of separation of the children. It was then that she realized that she had elected to be impaled on the wrong horn of her dilemma.

We respectfully suggest to the Court that coercion which arises out of the peculiar circumstances facing a defendant, if sufficiently impelling, may make involuntary what appears to be a plea voluntarily entered in a criminal action; and under those circumstances, entering a plea of guilty is not a waiver of constitutional rights.

In a discussion of this subject matter, the text in 66 A.L.R. 828, reads as follows:

> "The Oklahoma Statute provides that 'the Court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted'.
>
> The uniform holding of the Court in construing this Statute is that the defendant in a criminal action should be permitted to withdraw his plea of guilty, given inadvisedly, either before or after judgment, where any reasonable ground is offered for going to the jury; and, while this a matter within the discretion of the Court, the discretion is a judicial one which should always be exercised in favor of innocence and liberty." (citing cases)
>
> In Porter vs. State, 58 Okla Criminal Reports 54:
>
> "In our opinion the defendant should have been permitted under all the facts and circumstances to withdraw his plea of guilty when he applied for leave to do so. There is nothing to show that the Motion was not made in good faith, or that the entering of the plea and the Motion to withdraw it was intended for delay. A defendant should not be allowed to trifle with the Court by deliberately entering a plea of guilty and capriciously withdrawing it on the date set for pronouncing judgment, but when there is reason to believe that the plea has been entered from inadvertence, and without due deliberation, and mainly from the hope that the punishment may be thereby mitigated, the Court should be indulgent in permitting the plea to be withdrawn."

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In the above case, the defendant was represented by counsel.

The general rules are set forth in the following citations:

"Within the discretion of the Court, a plea of guilty may be withdrawn under certain conditions and a plea of not guilty entered. The law is not so technical as to regard the entry of a plea of guilty as a finality, especially when dealing with the life or liberty of a citizen....."
(15 Ohio Jurisprudence (2nd) 416, Criminal Law, Section 217.)

"The withdrawal of the plea of guilty should not be denied in any case where it is in the least evidence that the ends of justice will be subserved by permitting not guilty to be pleaded in its case....."
(16 Corpus Juris, 398, Section 730.)

"The least surprise or influence causing an accused to plead guilty when he has any defense should be sufficient grounds for permitting a change of plea from guilty to not guilty....." (21 American Jurisprudence (2nd) 497, Criminal Law, Section 505)

"The plea of guilty to a serious criminal charge should be freely and voluntarily made and entered by the accused without a semblance of coercion and without fear or duress of any kind and the accused should be permitted to withdraw a plea of guilty entered inadvisedly when application therefore is duly made in good faith and sustained by proofs and a proper offer is made to go to trial on a plea of not guilty..." (Clay v. State, 82 Florida 83; 89 So. 353)

"But while it is conceded that a change of plea rests in the discretion of the Court, such discretion should not be exercised arbitrarily, but should rest upon settled principles of justice, with a due regard to existing conditions. An abuse of discretion on the part of the trial court in this respect may result from failure to apply the principles of law applicable to a situation so that prejudice results to the accused..." (45 Ohio Jurisprudence (2nd) 415, Section 215)

The cases which generally hold against a defendant who seeks to change his plea, are almost without exception cases where the Court has already passed sentence. The Petitioner herein filed her Motion eleven days before sentence was handed down.

Giving the Petitioner her day in Court will in no manner prejudice the rights of the State of Ohio nor abridge the privileges of its citizens. Indeed, there will be no enlargement of rights and privileges, only their clarification.

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## CONCLUSION

For each and all of the foregoing reasons, we respectfully suggest that Certiorari be granted.

Respectfully submitted,

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# In the Supreme Court of the United States

**OCTOBER TERM, 1967.**

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KATHERINE ANN ARKEY,

*Petitioner,*

v.

THE STATE OF OHIO,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE STATE OF OHIO,
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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### OBJECTIONS TO JURISDICTION.

The State Court has not decided a federal question of substance not theretofore determined by this Court, nor has the State court decided any question in a way not in accord with applicable decisions of this Court. No real or substantial federal question is involved herein.

### QUESTION PRESENTED.

Whether petitioner has been deprived of the right to trial and due process of law by the refusal of the trial court to permit her to withdraw her plea of guilty to an indictment when the record does not support her claim that at the time of entering such plea she did not understand the nature and consequence of such plea.

## STATEMENT OF THE CASE.

Katherine Ann Arkey was indicted for the crime of manslaughter in the first degree (Ohio Revised Code Section 2901.06), the indictment charging that on February 26, 1966 she unlawfully killed Anthony Galish. On March 29, 1966, at arraignment, she entered a plea of not guilty.

On July 18, 1966, the petitioner with her counsel appeared before the trial court and withdrew her plea of not guilty and entered a plea of guilty to the indictment. At the request of counsel, the court referred the matter to the Probation Department and to the Psychiatric Clinic for investigation and report and passed the case for sentence. The court received the psychiatric report on October 14, 1966.

On November 17, 1966, the petitioner filed a motion for an order permitting her to withdraw her plea of guilty and to have the matter set for hearing before a jury. Said motion was accompanied by an affidavit of the petitioner. The case came on for sentencing before the court on November 28, 1966, defendant and her counsel being present. The court overruled the motion to withdraw the plea of guilty and sentenced the petitioner to the Ohio State Reformatory for Women. The petitioner was continued on the same bail pending appeal. The Court of Appeals for Cuyahoga County, Ohio, affirmed the judgment of the trial court. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

## ARGUMENT.

No substantial federal question is presented in the refusal of the trial court to permit the petitioner to withdraw her plea of guilty, which she admits was made with the assistance of counsel and after warning by the trial court that by pleading guilty she might thereby be waiving her constitutional rights. Petitioner's claim that she was not accorded Due Process and the right to trial in the Ohio courts is based on her assertion that when she made the plea she did not fully understand that she might be sentenced to imprisonment.

The petitioner has not filed in her appeals in the Ohio courts any transcript of the proceedings before the trial court on the plea and sentencing. The statement in the petition of "Facts Material to the Consideration of the Questions Presented" is not supported by anything in the files in this case other than her affidavit in support of her written motion to withdraw her plea, which reads:

> "KATHERINE ANN ARKEY, being first duly sworn, deposes and says that she is the defendant herein; that she has heretofore entered a plea of 'Guilty' in this action; that at that time and prior thereto, both counsel and the Court explained in detail her right to a trial; that nevertheless, at the time she entered her plea, she was distraught with worry and did not fully understand the enormity of the possible consequences of entering her plea; and that she respectfully prays the Court to give this defendant her day in Court."

The proceedings on the plea, taken from a transcript prepared by the official court reporter, are as follows :

> "Mr. Friedman: If the Court please, this is the case of Katherine Ann Arkey. Defendant stands before the Court under indictment for manslaughter in the first degree, Revised Code 2901.06, represented

by Frank Spiegel. Thorough discussion has been had with Mr. Spiegel and after said discussion it is my understanding at this time this defendant wishes to withdraw her plea of not guilty of the charge contained in the indictment and enter a plea of guilty as charged.

The Court: Mr. Spiegel.

Mr. Spiegel: Your Honor, that is correct, as the prosecutor just set forth.

* * *

Mr. Friedman: Miss Arkey, would you step forward?

The Court: The Court's remarks are addressed to the defendant.

You are represented in this case by eminent and able counsel, well qualified to protect your interest in every respect. However, there are certain things that the Court as a matter of policy—should be asked directly from the defendant.

* * *

The Court: The Court's remarks are addressed to the defendant. I will ask you certain questions. Consider your answer carefully for by them you may waive constitutional rights that are established by law for your protection. You should not waive these rights unless it is in your own best interest to do so.

Did you receive a copy of the indictment in this case in which you are charged with manslaughter in the first degree?

The Defendant: Yes, sir.

The Court: You know that you are entitled to a jury trial in this case, or if you refer, to a trial by a judge without a jury.

The Defendant: Yes.

Mr. Spiegel: Speak up so the court reporter can hear you.

The Court: You know you are entitled to a full, fair and impartial trial whether by a judge or a jury.

The Defendant: Yes.

The Court: You know that the statutory penalty for the charge of manslaughter in the first degree is one to twenty years in the Ohio State Reformatory for Women.

The Defendant: Yes.

The Court: Having this in mind, is it, nevertheless, your desire and request for permission to withdraw your plea of not guilty formerly entered to the charge placed against you by the indictment and for permission to enter a plea of guilty to the charge in the indictment, the same being for the offense of manslaughter in the first degree under Section 2901.06 of the Revised Code?

The Defendant: Yes.

The Court: Are you doing this of your own free will?

The Defendant: Yes.

The Court: Are you doing this of your own free act and deed?

The Defendant: Yes.

The Court: You understand that as yet the Court has made no decision regarding its possible sentence, has given no indication to your counsel as to what the sentence may or may not be.

The Defendant: Yes.

The Court: Such being the case, entry is made as follows:

Defendant in open court with her attorney present, and being advised of her constitutional rights, and on recommendation of the prosecutor, is permitted to withdraw her plea of not guilty as charged of manslaughter in the first degree, Section 2901.06 of the Revised Code.

The Court's remarks are again addressed to the defendant. How do you plead with reference to the charge of manslaughter in the first degree?

The Defendant: Guilty.

The Court: Let the record so indicate.

Mr. Spiegel, I feel that an investigation and presentence report by the Probation Department would be of help in making final disposition of the case.

Mr. Spiegel: I would so request, your Honor, referral to the Probation Department.

The Court: Very well. Defendant will be continued on the same bond."

In this case, before pronouncing sentence, the trial court conducted a hearing on the motion to withdraw the plea of guilty, at which the petitioner and her counsel were present. The transcript above mentioned shows that the court overruled the motion, stating:

"The Court: The Court has considered this motion and the evidence submitted therewith and the arguments of counsel. Under the circumstances the Court feels that the motion should be overruled. It is, therefore, overruled."

The court then heard further arguments of counsel and a plea by the petitioner herself that she be granted probation. The basis of petitioner's plea was the likelihood of hardship to her family should she not be granted probation. The following remarks of the trial court in pronouncing sentence, taken from the court reporter's transcript, are pertinent to petitioner's claim of clear abuse of discretion amounting to a denial of Due Process:

"The Court: First, let the record show that the defendant is here for sentencing. The Court has reviewed the presentence report of the Probation Department with a psychiatric report, which was obtained under Section 2951.03 of the Revised Code and which, therefore, is a part of the presentence report.

This has been discussed at length with counsel for the defendant on several occasions.

At this time I wish to tell the defendant that the law provides that prior to sentencing the defendant

has the opportunity to make any statement she wishes to the Court.

I will say that this matter has been discussed thoroughly with defendant's counsel and defendant's counsel will have an opportunity to make any statements he feels desirable on behalf of the defendant before sentencing, but at this particular time the Court does ask the defendant whether she has anything to say prior to sentencing.

* * * * *

"The Court: Well, thank you, counsel, for your remarks, which, as I have indicated, have given the Court great concern.

However, the crime involved here was first degree manslaughter, no more and no less. While the Court has sympathy and concern for the defendant's husband and children, this sympathy and concern cannot be the controlling features in this case.

The Court has also sympathy and concern for the deceased and for the deceased's parents. Those, too, are not controlling in this situation.

It is with utmost regret and greatest concern that the Court has observed the number of child beatings that have come to the light in the past years and this must be reversed, and the Court intends to do everything in its power to bring about the necessary reversal. This element and phase of the case is one of more or less compelling considerations that the Court sees here.

The Court, therefore, sentences the defendant to the Ohio State Reformatory for Women at Marysville, Ohio."

As to change of plea, Section 2943.03, Revised Code of Ohio, provides in part as follows:

"The court may, for good cause shown, allow a change of plea at any time before the commencement of the trial."

The allowance of a change of plea is therefore within the sound discretion of the trial court. See paragraph two of the syllabus of *State v. Frohner,* 150 Ohio St. 53. Although such discretion should be liberally exercised in favor of the accused, nowhere in the present situation does it appear that there was any abuse of discretion by the trial court. The defendant was represented by competent counsel of her own choosing. The trial judge with deliberate care explained her statutory and constitutional rights to the defendant, and then prior to sentencing, the judge conferred with defendant's counsel on several occasions with regard to the probation and clinic reports. There is not a shred of proof that any promises or inducements were offered petitioner to enter her plea of guilty or of any mistake, misconception of the nature of the charge, misrepresentation or misunderstanding of its effects.

It is apparent from the petition that what the petitioner really sought in connection with her request to allow a change of plea was the certainty of probation. There is no indication that her request flowed from any real desire to have her case submitted to a jury on the merits. The administration of justice does not countenance the right of a person who formally declares his guilt to gamble with the law by pleading guilty in the expectation of receiving a suspended or a light sentence and then demanding as his right a withdrawal of his guilty plea when the sentence is greater than he expected. *State v. Martin,* 158 N. E. 2d 414. It is fundamental that probation, being a matter resting wholly within the discretion of the trial court, is not a matter with which the reviewing court can interfere.

The state courts of Ohio having reviewed and decided the factual issue of whether at the time of entering her plea of guilty the petitioner understood the nature

and consequences of such plea, this question is not open for reconsideration by this Court. *Hoag v. New Jersey*, 356 U. S. 464, 471, 2 L. ed. 2d 913, 920, citing *Watts v. Indiana*, 338 U. S. 49, 50, 51, 93 L. ed. 1801.

## CONCLUSION.

The petition, in effect, asks the Court to enter the domain of the proper apportionment of punishment by reviewing her sentence imposed by a state court. The claim that peculiar circumstances facing the petitioner served to make her plea involuntary is not supported in the record, and the Ohio courts have so held. There is therefore nothing for this Court to consider in connection with the petitioner's claim that she should have been permitted to withdraw her plea of guilty and be given another day in court.

The petitioner not having shown any deprivation of constitutional rights entitling her to review by this Court, the writ should be denied.

Respectfully submitted,

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